Supreme Court of the United States

No. 916

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

LEONARD M. BERNARD

and

JAMES B. JACKSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Leonard M. Bernard and James B. Jackson, respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit are appended to this Petition, and appear in the certified record. The original opinion issued January 6, 1961, and an additional opinion accompanied the denial of a rehearing on April 6, 1961.

The judgments of the United States District Court for the Northern District of Illinois, Eastern Division, which were appealed from consisted of sentences entered September 17, 1959 by the Honorable Edwin A. Robson. One of the petitioners here, Leonard M. Bernard, was sentenced to eighteen (18) months' imprisonment and a fine of Ten Thousand ($10,000.00) Dollars. The second petitioner here, James B. Jackson, received a suspension of the imposition of sentence and was placed on probation for a period of two (2) years. The third appellant in the Court of Appeals below secured the reversal of his sentence of imprisonment for six (6) months, and a fine of Five Thousand ($5,000.00) Dollars, by the judgment and opinion of the said Court of Appeals on January 26, 1961.

A fourth defendant in this case was acquitted by the District Judge on her motion at the close of the government's evidence.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on January 26, 1961. On April 6, 1961 it was ordered that the petition for rehearing be denied. (These orders appear in petitioners' Appendix hereto.) This petition is filed within thirty days of the denial of the petition for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Where, by separate, independent, but similar acts, employees received and retained, respectively, varying cash gratuities in excess of sales prices for automobiles

sold by their employer, a franchised dealer, which charged factory-suggested prices, did the employer corporation receive gross income to the amount of said cash gratuities retained by the employees, and not entered on the books of the corporation, or treated in its tax return?

2. Where the district court did not consider or submit any of these issues to the jury, but only, in effect, submitted a government theory of joint enterprise and vicarious liability and where the single count charged willful attempt to evade the Corporation tax by filing a false return, with no charge of conspiracy, were not the convicted defendants denied a fair trial and due process of law, by instructions near the end of the taking of government evidence, and again in the final charge that all previously limited evidence admitted against any defendant should be now considered against all, including the two remaining convicted defendants, and by refusal of a request for instruction that the guilt or innocence of each defendant was to be considered separately?

3. Were the employes in such a case embezzlers from the Corporation, extortioners from the corporate customers, or taxable recipients of gratuities independently accepted under claim of right, there being no proof of stock ownership or claim of constructive dividend?

4. Did not the refusal of a request to charge as follows,

> "'Throughout these instructions, I will refer to the defendants generally. You are instructed that each instruction is to be applied by you to each of the defendants separately. The reason for this is that each defendant stands on his own defense. You are to consider the evidence as to each defendant separately, and you must determine the guilt or innocence of each defendant separately",

constitute reversible error? Did not this error compound the confusion and unfairness of the instructions charging that presence of a common plan or to design to engage in a general course of corporate business transactions of the type shown by the evidence, would authorize consideration of previously limited evidence against all defendants?

5. Did admission over objection of testimony which evaluated and resolved conflicts in prosecution evidence by a witness described by the Court of Appeals Opinion (p. 6) as "an expert witness to his evaluation of the testimony" invade the province of the Jury and deprive the defendant of his right to trial by Jury?

6. Did not the admission into evidence as Exhibits of charts and summary made by such witness, which contained the result of judgment by the witness of evaluation of testimony and documents, and distribution of copies to the individual Jurors and submission of the charts to the Jury for consideration during deliberation, constitute reversible error, where the charts contained conclusive headings such as "Amount retained by witness who bought car" and "Understatement by Bernard Bros. Inc.," which were ultimate conclusions for determination by the Jury?

7. Was guilt ascertained under standards appropriate for a fair trial in the Federal Courts when fragmentary third party books and records, admittedly falsely kept, were received in evidence over objection, without proof of trustworthiness, under a mistaken application of section 1732 T. 28 U.S.C., and interpreted by witnesses who claimed no memory of the events, which were ten years past, at trial time?

Did this not deny confrontation by sworn witnesses subject to cross-examination as required by the Sixth Amendment?

8. Did not the refusal of the trial Court to grant inspection and use of the reports of Government witness agents, where they were requested under Section 3500, Title 18, U.S.C., constitute reversible error? And did not the Court of Appeals below decide the appeal below by a judgment and opinion which conflicts with its own prior decision (*U.S.* v. *Berry*, 277 F. 2d 826; *U.S.* v. *Sheer*, 278 F. 2d 65) and decisions of this Court (*Campbell* v. *U.S.*, 365 U.S. ....., 5 L. Ed. 2d 428, Jan. 23, 1951; *Clancy* v. *U.S.*, 5 L. Ed. 2d 574, Feb. 27, 1961)?

9. Is not the *Jencks Act* (Section 3500, Title 18, U.S.C.) unconstitutional if construed as a legislative restriction upon the duty of the "judicial Power" to afford fair trials and due process of law?

STATEMENT OF THE CASE.

The petitioners, Leonard M. Bernard and James B. Jackson, were indicted, along with Charles E. Bernard and Adelaide Locke Adsit, on March 4, 1955. The one-count indictment charged the four above-named individuals with attempting to evade the corporate tax of Bernard Bros., Inc., by filing and causing to be filed a false and fraudulent income tax return for the corporation for the year 1948. The indictment herein was unique, in that usually—in this type of case—the defendants are also charged in other counts with evasion of their individual taxes. In this case there was no charge of individual income tax evasion by any of the defendants. The corporation reported net income of $298,833.64 and paid taxes in the year 1948 in the amount of $113,556.78. The one-count indictment

charged that an additional amount of $78,053.82 was not reported as income, upon which an additional tax of $29,660.45 was due.

The trial lasted approximately five weeks, and while the government failed to prove the items of amounts alleged in the indictment and the bill of particulars, it contends that proof of unreported additional corporate income of $35,108.06 was made, on which additional tax in the amount of $13,341.07 was due and owing for the year 1948. The gross receipts of the corporation for the year were first less than $2,000,000.00.

Three of the four defendants were convicted in the court below, and an appeal was taken. The errors relied upon related to a practical amendment of the indictment by the government; and a conviction on a charge not made in the indictment; a denial of a plea in bar, based on the statute of limitations as to one defendant; the admission of "regularly falsely kept" records of third parties under Section 1732, Title 28, United States Code; error in admission of certain charts; error in the failure to grant several motions for mistrial; error in the restriction of defense cross-examination of government witnesses; error in the admission of evidence at variance with the bill of particulars; the insufficiency of the evidence; the failure to establish that the alleged payments were corporate income; failure to establish any motivation; and the failure of the court to give certain tendered instructions; and error with reference to certain given instructions.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, as to the defendants, Leonard M. Bernard and James

B. Jackson, and reversed as to the defendant, Charles E. Bernard, on the grounds that the evidence was insufficient to sustain a conviction as to this defendant.

STATEMENT OF FACTS.

Bernard Bros., Inc., a corporation, was engaged in the year 1948 in the sales of new Plymouth and De Soto automobiles, and in the sales of various types and makes of used automobiles. Its officers were: Leonard M. Bernard, President; Charles E. Bernard, Vice President, (whose conviction was reversed by the Court of Appeals), and James B. Jackson, Secretary and office accountant. Another defendant was Adelaide Locke Adsit,. the cashier and bookkeeper, who was dismissed on motion for judgment of acquittal, made at the close of the government's case.

The 1948 corporate tax return was signed by Leonard M. Bernard and James B. Jackson in their respective official capacities. The return reported net taxable income of $298,833.64 and a total tax due of $113,556.78, which was paid. The government contends that the proof in this case tends to demonstrate that the corporation had additional unreported income of $35,108.06, upon which additional tax in the amount of $13,341.07 was due and owing for the year 1948.

The government based its case on claimed corporate failure to report additional gross income, allegedly derived from gratuities over and above the invoice sales price to at least five persons, including the four defendants. No used car sales are charged or involved. No individual liability of any of the various defendants was charged in the indictment.

While the gratuity transactions were essentially alike, the proof took somewhat different forms. Most of the cars were sold to used car dealers, either directly or indirectly through persons known to the trade as "bird dogs", who secured the automobiles and, in turn, resold them to a used car dealer. Where the "bird dogs" were involved, specific transactions were proved by generalities. The "bird dogs" did not remember any specific transactions and did not keep records of their transactions. Thus, the proof of the overages depended upon the testimony of "bird dogs" who did not remember any specific transactions, and who did not keep books or records. Coupled with this "bird dog" testimony as to generalities, the used car dealers were permitted to testify that their records did not reflect what they purported to reflect, but, in fact, reflected something else. By this method of proof, the government contended that its evidence established that 103 new automobiles sold by Bernard Bros., Inc. in 1948 and shown upon its books as sold to individual purchasers, in whose names titles were issued by the Secretary of State of Illinois, upon applications signed by those persons, had, in fact, been purchased by the so-called "bird dogs", who made these purchases in the names of individuals, and represented that they were acting for the individuals, but in fact, were acting for used car lot dealers. These used car dealers resold the automobiles at prices above the factory-suggested prices for franchise dealers.

In the evidence introduced by the government, the names of the purchasers from these used car lot dealers usually appeared to be the names presented to Bernard Bros., Inc. and were the names in which Bernard Bros., Inc. issued invoices and bills of sale.

Govt. Exhs. 3, 4 and 5, books of Bernard Bros., Inc., showed a total sale of more than 800 new cars. The evidence given in its most favorable view for the government only involved 103 of these new cars. Besides this, it was established that Bernard Bros., Inc. did an extremely large used car business, which was not involved in any violation. The total sales of new and used cars amounted to approximately $2,000,000.00 for the year 1948.

With the foregoing in mind, so far as "new-used" cars were concerned, the government called as witnesses a number of "bird dogs", or persons who testified that they were able to purchase automobiles from Bernard Bros., Inc. during 1948. The government also called witnesses who said they acquired cars from said "bird dogs". These were used car lot operators usually.

One of the most important questions involved in the trial was how much money was paid for any particular "new-used car". There were eight witnesses who said that they dealt directly with either Leonard M. Bernard or James B. Jackson, petitioners herein, or Charles E. Bernard, or Adelaide Locke Adsit, defendants who are no longer in the case, or one George Smith, who was a sales manager of the corporation, and one of the principal government witnesses. E. Gallagher, the first of such witnesses, estimated that he had thirty-five transactions with the various defendants. He remembered no one transaction, and had no independent knowledge of any transaction. He could not remember any particular automobile. In turn, he sold the 35 automobiles to Nichols Motors Company of Chicago, Illinois. Two brothers, Gordon Nichols and Marvin Nelson, operated Nichols Motors Company. They dealt in cash with Gallagher. Transactions were not specific, as none of the parties, including Nichols

and Nelson, had any independent recollection of any particular purchase or sale. After stating an inability to recall any particular transaction, the Court then permitted testimony as to a variable pattern to be related by Gallagher and Nichols:

Usually, Gallagher would come to either Gordon Nichols or Marvin Nelson and state that he could get an automobile from Bernard Bros., Inc. Either Gordon or Marvin would draw a check to cash, cash it, and then turn the money over to Gallagher, who had no recollection of any particular amount, but he would also take some of the cash for himself. He did not know in what amount Nichols Motors drew any particular check. He did not know any amount he paid Bernard Bros., Inc., but he usually paid Adelaide Locke Adsit. Sometimes, Leonard M. Bernard was present. The 35 automobiles, so far as Bernard Bros., Inc. books are concerned, reflect the sale to an individual and separate purchasers. As far as any gratuities are concerned, the gratuities are shown to have been given to a person who was dismissed at the close of the government's case, and who is not a petitioner here.

Thus, out of 103 automobiles, the proof which reflects the payment of monies to the bookkeeper of the corporation in connection with the sale of approximately one-third of said automobiles was considered by the District Court to be insufficient.

The gratuities which were given to Adelaide Locke Adsit, who was found to be not guilty by the court, were admitted in evidence as against the petitioners, who did not receive said gratuities.

In order to demonstrate what was paid for the automobiles purchased by Gallagher, the government intro-

duced, over objection, certain Nichols Motors records, which were admittedly false, and then permitted witnesses who had no independent recollection of any particular transaction to *vary* the transactions, as reflected in Nichols' books, by testifying in effect that the entries were regularly falsely kept. From certain check stubs, drawn to everyone but Bernard Bros., Inc., Gordon Nichols and his brother, Marvin Nelson, though professing no recollection of any individual transaction, were permitted to testify that the amounts on the checks were the amounts that they turned over in cash to Gallagher.

This, then, is the basis upon which the government proved approximately how much was paid in gratuities to Adelaide Locke Adsit, a dismissed defendant.

Aside from evidentiary deficiencies, the foregoing represents the general pattern of the government's proof. In most instances, the actual purchaser from Bernard Bros., Inc. did not have any evidence of payment, other than as reflected in a third party's books. Of the eight witnesses who testified that they dealt directly with Bernard Bros., Inc., this is true of the following witnesses: Joseph L. Chapman, Lawrence Fisher, Anthony Antonucci, Adelaide Lorbeer, Joseph D. Kasny and Anthony Volante. In several instances, for example the witness Volante, the exact amount of cash paid was stated as having been paid to corporate employees.

Witnesses by the names of Raymond Stoltz, Frank Stoltz and Dolly Stoltz testified that they dealt directly with Bernard Bros., Inc., and had certain incomplete records, to which the defense objected. They were kept in much the same manner as the Nichols Motors Company records. Frank Stoltz and Dolly Stoltz were husband and wife,

and Raymond Stoltz was the son of Frank Stoltz. Their regular books were unaccountably missing, and the testimony of these witnesses depended largely upon a so-called "Police Book", an account in which entries were regularly falsely made. The same pattern was again followed, wherein the government attempted to prove by third party books some approximate prices for the automobiles.

After nearly all of the evidence was offered by the government as to "bird dog" and used car dealer testimony, which said testimony related to various conversations and payment of gratuities to various defendants, including a non-defendant, Mr. George Smith, during the year 1948, the government moved to admit all of the evidence as to each defendant as against all of the defendants. Over objection, the court then instructed the jury that the evidence against any one of the defendants was admissible against all co-defendants, with three exceptions. Conspiracy was not charged in the indictment.

At the conclusion of all of the purchaser witnesses, the government then called William Ruggaber, an Internal Revenue employee, who testified that he listened to all the testimony, and then prepared an exhibit which he referred to as a "Summary". (Govt. Exhs. 76A, B, C, D & E). Over objection, a copy of this exhibit was given to each of the jurors, and this witness testified to the contents thereof. The exhibit purported to be his evaluation of each of the previous government witnesses, and a computation, based on *his* appraisal of the amounts estimated to have been paid to various defendants, as well as to Mr. George Smith, whom the prosecutor did not see fit to have indicted. The exhibit was admitted in evidence and went to the jury, over further objection.

A revenue agent stated that he checked the balances of the accounts in the books of Bernard Bros., Inc. against the figures shown on the Bernard Bros. tax return, and then stated that the income reported on the books and records tied in with the item reported on the corporate tax return. At no time was any testimony given as to whether any of the alleged over-payments were reflected in Govt. Exhs. 3, 4 and 5, which contained approximately seventeen income accounts or categories in the books and records, where various types of income would be reflected. There was a substantial disagreement as to the adequacy of compliance with section 3500 Title 18 U.S.C. as to agent witnesses.

There is no evidence as to the disposition of the cash amounts respectively received by the individual employes, nor the respective totals, other than that in some instances it was pocketed. No proof was made of knowledge by any one of the defendants of the specific amounts or total received by any other. There was no proof as to whether any defendant was a shareholder of Bernard Bros. Inc., or Lee-Holder Company, as it was also called in the indictment.

REASONS FOR GRANTING THE WRIT.

This Honorable Court should exercise its jurisdiction in this case for the following reasons:

1. The Court of Appeals below decided this case by an Opinion contrary to it own prior Opinions and contrary to decisions of this Court.

2. The Court of Appeals below has sanctioned a course of conduct by a trial Court which is so contrary to usual and appropriate standards for a fair trial

in the district courts of the United States, as to call for an exercise of the supervisory powers of this Court.

3. The Court of Appeals has interpreted a decision of this Court in a prior case (*Clancy* v. *U.S.* 5 L. Ed. 2d 574, Feb. 27, 1961, No. 88 of the October 1960 Docket) in a manner which unduly limits and distorts the decision.

4. The Court of Appeals below has rendered an Opinion in which it did not properly apply Section 1732, Title 18, U.S.C. (admission of documents) and Section 3500, Title 18, U.S.C., (Jencks Act on agent witness reports).

5. Important questions which have not been resolved exist in this case.

The trial Court in this case at a point late in the extended trial, which consumed more than five weeks, gave the following instruction during the reception of Government evidence,

> "You are to consider all of the admitted evidence offered by the Government, with the exception of the three specifications that I have specifically noted, as having been received against all of the Defendants. Thank you." A. 1816.

Examination of the Appendix filed in the Court of Appeals would indicate the vigorous objection of the defendants and almost bitter complaint that they were being submitted to a surprise action after they had foregone cross-examination of the type required if the evidence had been admitted in the fashion it was presented.

The Court of Appeals did not rely upon the record to support its contention that no surprise existed, but merely repeated the words of the District Judge, page 7 of the Opinion.

The instruction given in the course of the reception of evidence, and recited above, was a peremptory command to consider all evidence against all of the defendants. It was not conditioned upon a finding by the jury that any agreement or conspiracy might exist.

This instruction was not repealed, revoked, excused or explained by the Court's final charge, which appears at pages 1959 and 1960 of the Appendix filed in the Court of Appeals.

While it is true that in the final charge the trial Judge submitted the possibility of the existence of a conspiracy for the decision of the jury, he did not correct in any manner his instruction given during the reception of evidence, A. 1816.

Therefore, on this crucial issue, there is an equivocal confusing charge to the jury, regardless of other errors involved in the Court's action at the prosecutor's behest. A conviction should not rest upon equivocal instructions upon a crucial issue. Even a good instruction will not cure a prior bad instruction, if both are left for the jury's consideration. *Bollenbach* v. *U.S.*, 326 U.S. 607, 613.

In a case decided on March 1, 1961 after the first opinion in this case on January 26, 1961, but prior to the denial of the Petition for Rehearing in this case, and just published in the Advance Sheets for May 1, 1961, the Court of Appeals below, for the Seventh Circuit, gave its opinion in *United States* v. *Pronger*, 287 F. 2d 498. This decision by another panel of the same Court of Appeals decided a

criminal case which was brought on appeal from the Northern District of Indiana, while the one at bar arose from a District Court of Illinois. District Judge Mercer the author in the case at bar sat on both panels. It is recognized that this Court has said there need not necessarily be uniformity in the decisions of various panels of a Court of Appeals. However, it is urged that the substantial variance in the position of the Court on the same question, requires the intervention of this Court to provide uniform justice for all, and to prevent confusion, and the nurturing of different Federal law in different States in the same Court of Appeals Circuit.

In the *Pronger* case, 287 F. 2d 498, the circumstance of equipoeal instructions was not as flagrant as in the case at bar. In the *Pronger* opinion, the facts were recited as follows, (P. 499)

> "Before the court proceeded to instruct the jury on the law, government counsel made a motion that Kadet's testimony as to his conversation with Roberts be admitted as to Pronger. The court remarked that it was his understanding that once there is sufficient evidence to establish a joint enterprise or concerted action of associated persons to accomplish an alleged crime, under those circumstances the alleged conversation of one alleged conspirator is binding on the alleged conspirators.
>
> "Counsel for Pronger suggested to the court that 'you should leave to the jury whether or not a common design has been established • • •.'
>
> "Government counsel urged that the prosecution had shown a common scheme or plan by the evidence itself."

The Court then instructed the jury and in the course of the instruction submitted the question of whether there

was a common design. At 287 F. 2d 498, 500, the Seventh Circuit Court of Appeals, which also decided the case at bar, said:

> "Whether intentional or not, we believe that the court's remarks had the effect of telling the jury that the government had proved that the common design or common concert of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350.
>
> "For tese reasons, the judgment of the district court as to Pronger only is reversed and this cause is remanded to that court for a new trial as to the defendant Pronger."

Certainly by the same reasoning these petitioners were deprived of a fair trial by jury.

Further involved in this instruction was the conscious and deliberate effort to impose vicarious responsibility in a criminal case under the law of agency, where the crime involved required specific intent, willfulness, and knowledge.

There was no charge of conspiracy against these defendants. The trial Judge read into the indictment such a charge by his statement which is recited at page 7 of the Opinion of the Court of Appeals, "But the *broad terms* of the indictment would *imply* that there was a common design or a common plan to defraud the Government, with only one exception." No case will be cited by the United States which will support this derogation of the constitu-

tional requirements for adequate pleading in an indictment. Mere "notice" pleading cannot justify the requirement of the Constitution which commands that the accused shall be informed of the nature and cause of the accusation against him.

In the case at bar throughout the trial up to the motion of the Government to consider all evidence against all defendants, as is demonstrated by some 1800 pages of Appendix, the defendants were led to believe that each defendant was being tried upon the charge made against him, by the appropriate limitation of evidence as it was admitted.

Suddenly the indictment was distorted and amended to a conspiracy charge with no Overt Act specified, and with no dates or other premises against which the defendants could prepare.

In *Stirone* v. *United States*, 4 L. Ed. 2d 252, decided by this Court January 11, 1960, this Court unanimously condemned the amendment of indictments by the admission of evidence and, among other things, said:

> "And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same."

In the case at bar, although the District Court acquitted one defendant at the close of the Government's evidence, and the Court of Appeals found the evidence insufficient as to another defendant, the two petitioners were held responsible for all of the acts of these acquitted persons, regardless of knowledge of their acts. Motivation was given

little or no consideration at any stage of this proceeding. Yet, the record indicates no reason for either petitioner to distort the corporate income. No advantage is indicated by the evidence. Hence, it is contended that *Ingram* v. *United States*, 360 U.S. 672, 3 L. Ed. 1503, is appropriate for consideration. In determining the matter of motivation, the status of these defendants is important. Did they embezzle? Did they extort? Or did they receive gratuities under a claim of right, which monies were taxable to them as individuals?

It is respectfully submitted that the confusion in instruction to the jury which characterized this ten-year old five-week long prosecution and resulted in proof of half of the amounts alleged in the indictment, the acquittal of one of the four defendants by the District Judge, and the reversal of another defendant's conviction by the Court of Appeals, was further augmented by the refusal of the trial Court to charge as follows:

> "(The following instruction, designated Defendants' Instruction "B" was refused by the Court, and is as follows:)
>
> "Throughout these instructions, I will refer to the defendants generally. You are instructed that each instruction is to be applied by you to each of the defendants separately. The reason for this is that each defendant stands on his own defense. You are to consider the evidence as to each defendant separately, and you must determine the guilt or innocence of each defendant separately." A. 1932.

It has been urged in the Court of Appeals below that other instructions were tantamount to the one requested. However, no clear, lucid statement of this fundamental principle was given to the jury. It is not often that demonstrable prejudice is so apparent. Here the Court of Ap-

peals found it necessary to reverse without remand the conviction of one of the three defendants. It is submitted that no better reason for this reversal could be given than that he did not receive separate consideration of his guilt or innocence, which explains his conviction on insufficient evidence as apparently the Court of Appeals readily saw.

A matter of substantial importance is involved in the admission of evidence of the witness Ruggaber and the admission to the jury of charts and copies prepared by him. It is respectfully contended that the witness, at the behest of the prosecutor, illogically made arbitrary determinations and appraisals of the evidence, A. 1733, 1935, 1766, 1767.

No one can argue that the existence and amount of "understatement" by Bernard Bros. Inc., is not a crucial issue. When the trial Court permitted a document with substantial figures under this heading to be displayed to the jury, after the figures had been resolved by the rejection of some of the testimony, and the appraisal and evaluation of other evidence by the "expert" witness, and the exhibit is not only brought home to each individual juror by individual copies, but was sent into the jury during its deliberations, then these figures acquired "an existence of their own, independent of the evidence which gave rise to them", *Holland* v. *United States*, 348 U.S. 121, 128, 99 L. Ed. 150, 160; *Steele* v. *United States*, CA 5, 222 F. 2d 628; *Lloyd* v. *United States*, CA 5, 226 F. 2d 9, 17; *United States* v. *Ware*, CA 7, 247 F. 2d 698. All of these decisions warned against the danger of charts which, although not evidence, are always likely to become more potent in unwary reasoning than true evidence, even in cases where the charts truly do no more than portray admissible evidence without conclusions.

To summarize the Government's evidence in this case, would lead to a statement that guilt was demonstrated not by the sworn testimony of witnesses, but by the recitation by witnesses of figures from untrustworthy books and records which were admitted under a misunderstanding of Section 1732, Title, U.S.C. This misunderstanding is to the effect that any book and record kept, is admissible if produced. In the case at bar, there was a complete abandonment of test of trustworthiness, and fragmentary third party records were admitted and were used as a basis of testimony by witnesses who stated they could not recall the facts. Obviously, these books could not be cross-examined. Nor could the witnesses be cross-examined about events which they professed they did not recall, A. 160, 545, 594, 595, 1260.

Thus, we have a picture of a witness who, under oath, says he cannot remember any particular transaction, A. 186; he is permitted to say the books would reflect the transaction, A. 72; he is permitted to state the books are true and correct, A. 72. Then, he is permitted to testify the books do not mean what they say; that false entries were regularly entered thereon, and that they mean something different from what they portrary, A. 153, 162, 187, 188. *Palmer* v. *Hoffman*, 318 U.S. 109, at pages 113 and 114, proclaims this Court's standard for the use of Section 1732, Title 28, U.S.C. Certainly, no Court should countenance untrustworthy records as a fundation for criminal convictions.

During the trial, the trial Judge in administering the so called Jencks Act, Section 3500, Title 18, U.S.C., examined, *in camera*, reports of agent witness Sharp. Very limited expurgated portions of his written reports concerning the case about which he testified were submitted to the de-

fendants for their use on cross-examination and in defense. By inadvertence, duly explained in the Court of Appeals, it was learned that at least part of these reports related to Sharp's examination of the corporation mentioned in the indictment and the examination of the tax liability of other witnesses, and of the defendants in the case.

Clearly, Sharp, the investigative agent, had accepted the self-serving claims of Smith, an employee of the corporation mentioned in the indictment, indeed the general manager, who admitted on the witness stand that he had accepted over-invoice gratuities. Sharp excused Smith from criminal liability and, perhaps, from tax liability by acceptance and belief of his, Smith's, statements. Government witnesses Kaziny and Gallagher were in the same category, except that they were dealers whose statements that they overpaid for automobiles were permitted to justify their deductions of these amounts from their gross income, whereby they avoided tax liability.

Sharp had an interest in avoiding criticism for undue leniency or for gullibility, if such existed. The right to cross-examine and place him in what the Court of Appeals below called a "proper prospective", including his relationship to the Government and its witnesses was clearly important. If it could have been demonstrated that Sharp expressed doubt or had contradicted the self-serving statements of these witnesses, his value as a Government witness would have been substantially damaged. Of course, all the exploratory possibilities of cross-examination cannot be exhausted by the mere imagination of defense counsel. Knowledge of the facts is necessary, and these reports of Sharp and the possibilities of their use have been suppressed from the petitioners by the trial and appellate application of the Jencks Act.

The defendants contend that the Seventh Court of Appeals has heretofore by *United States* v. *Berry*, 277 F. 2d 826, and *United States* v. *Sheer*, 278 F. 2d 65, correctly held that the entire reports of agents who become Government witnesses should be given to the defense. It is further the belief of the petitioners that this Court in *Campbell* v. *United States*, 5 L. Ed. 2d 428, Jan. 23, 1961, and *Clancy* v. *United States*, 5 L. Ed. 2d 574, Feb. 27, 1961, and prior decisions has indicated appropriate standards for the administration of Section 3500, Title 18, U.S.C. It is contended that these decisions stand for the proposition that the defendants are entitled to the written reports of a Government agent who takes the witness-stand insofar as they pertain to the case about which he testified.

This Court has held in *Jencks* v. *United States*, 353 U.S. 657, that:

> "The defense must initially be entitled to see them . to determine what use may be made of them."

And in the footnote thereto:

> "The trial judge cannot perceive or determine the relevancy and materiality of the documents to the defense, without hearing defense argument, after inspection, as to its bearing upon the case."

Does the defendant, who has availed himself of the statutory right of review, ever have the right to advocacy of counsel in the determination of whether or not the trial judge erred in refusing access to "statements", cognizable under 18 U.S.C. 3500, but refused as irrelevant and immaterial to the subject matter?

Anything in these reports which might have demonstrated bias or prejudice against the defendants, and in this case, motivation of his readiness to recall events and conversations ten years old, but not recorded in his notes

or reports, would be of vital importance in judging his credibility. (See *Alford* v. *United States*, 75 L. Ed. 624 and *Gordon* v. *United States*, 344 U.S. 414, on relationship of the witness to the prosecution).

It is further respectfully contended that the so-called Jencks Act, enacted subsequent to the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, and obviously by its language and history intended as a restriction upon the ruling in that decision, is unconstitutional if it impinges or authorizes impingement upon the constitutional right to confrontation by witnesses under oath, and the right to cross-examine, as set up in the *Jencks* decision, the *Alford* decision, and in the *Gordon* decision. Without any statute these cases held that the defendant had the right of exploratory cross-examination and to the statements of the witness to show the relationship of a witness to the prosecution, including its other witnesses. These decisions were reached on the basis of constitutional right of defendants. If the statute is to be construed as restricting or impinging upon this constitutional right, then this Court should declare it an attempt by the Legislature to infringe upon the powers and duties of the Judiciary, and as an attempt to restrict the administration of constitutional fair trials.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH
Counsel for Petitioners.

APPENDIX.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit.

SEPTEMBER TERM, 1960 SEPTEMBER SESSION, 1960

No. 12868
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LEONARD M. BERNARD, CHARLES E. BERNARD and JAMES B. JACKSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 26, 1961.

Before HASTINGS, *Chief Judge*, and DUFFY, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. The defendants, Leonard M. Bernard, Charles E. Bernard and James B. Jackson, were charged by indictment with having wilfully attempted to evade and defeat a part of the corporation income tax due and payable to the United States of America for the taxable year 1948 by Bernard Bros., Inc., a corporation, by the filing of a false and fraudulent income tax return on behalf of that corporation.[1] The return was alleged to have been false and fraudulent, as defendants well knew, in that the corporate income therein reported was understated in the amount of approximately $78,000.00 and that the tax due to the United States was therein understated

[1] The indictment also named the former cashier and bookkeeper of Bernard Bros., Adelaide Locke Adsit, as a defendant. The court directed her acquittal at the close of the government's case.

by approximately $30,000.00. After a trial before a jury, a judgment of conviction was entered by the court upon the jury's verdict finding all defendants guilty as charged in the indictment. Defendants appeal from that judgment.

During 1948, Bernard Bros., Inc., was a franchised dealer in new DeSoto and Plymouth automobiles at Evanston, Illinois. Defendants in the respective order in which they are above named, were the president, vice-president and treasurer of that corporation. For the taxable year 1948 an income tax return was filed on behalf of the corporation reporting taxable income of $298,833.64, and a total tax due of $113,556.78. That return was signed by defendants, Leonard M. Bernard and James B. Jackson, in their respective capacities as president and treasurer of the corporation.

The judgment must be reversed as to the defendant, Charles E. Bernard. The government concedes in its brief "that the evidence of Charles Bernard's guilt lacks the overwhelming persuasiveness of the case against Leonard Bernard and Jackson." We are convinced upon a review of the record that the evidence against this defendant lacks overwhelming persuasiveness to such extent that there is no evidence of his guilt of the crime charged.

Viewed in the light most favorable to the government, the evidence shows only that Charles Bernard was the vice-president of the corporation in 1948 and that he participated to some extent in the conduct of the corporate business in that year. The evidence fails to show that he had any knowledge of the books and records of the corporation, or that he participated in the preparation of the corporate tax return for 1948 or had any knowledge as to the filing or content of that return. His motion for acquittal made at the close of the government's case should have been granted.

The remaining defendants, Leonard M. Bernard and James B. Jackson, who are hereinafter referred to as defendants, except as the context otherwise requires, assert

a number of alleged procedural errors as a basis for reversal of the judgment. In order that these alleged errors may be placed in focus, the following summary of background facts and of the procedural chronology of the trial is set forth in advance of discussion of the particular errors alleged.

The theory of the government's case was that defendants, as officers and agents of Bernard Bros., adopted a policy of selling a substantial part of the corporation's new 1948 automobiles to used car dealers for a cash bonus over and above the manufacturer's list price; that, upon the sale of such cars for a cash bonus, the list price only was entered in the corporation's sales records; and that bonus payments received for such cars were not included in the corporation's gross sales as reported in the 1948 corporation tax return. To sustain its burden of proof upon that theory, the government undertook to prove the receipt by defendants and other agents of the corporation of cash bonus payments upon the sale of 103 specific new cars sold in 1948, and the omission from the corporation tax return of the specific items of income reflected in the receipt of such bonus payments.

As the keystone of its specific-omitted-item proof, the government introduced into evidence the corporate records of Bernard Bros., and the key book of those records was the sales journal, which contained entries reflecting a sales price and a factory installed identification serial number for each new car sold by the corporation in 1948.

The foundation for introduction of the Bernard Bros. records was laid by the testimony of Robert H. Sharp, an internal revenue agent. Sharp testified that he had received the Bernard Bros. books, including the sales journal, from the defendant Jackson, in 1950. In July, 1950, Sharp and a second agent made a complete transcript of new car sales for the year 1948 as shown by the entries in those books and records. From comparison of that transcript with the Bernard Bros. sales journal, Sharp was able to testify that the sales journal was the same

book from which he had made the transcript of new car sales in July, 1950. Sharp further testified that the net taxable income figure of $298,833.64, reported on the Bernard Bros. income tax return for 1948, was derived from the books which he had examined, and that the closing journal entries of all profit and loss accounts shown upon the corporation's books agreed, precisely, with corresponding items reported on the return. He testified that he could identify the books, including the Bernard Bros. sales journal, as records kept by Bernard Bros., because they had been supplied to him at his request by the defendant, Jackson, and had been identified to him as the Bernard Bros. books by both Jackson and Leonard Bernard. Sharp also testified that Leonard Bernard had stated to him in 1950 that all gross income of Bernard Bros. for 1948 was reflected in the books supplied to Sharp by Jackson and in the corporation tax return filed on behalf of the corporation for 1948.

The testimony of Sharp and the Bernard Bros. books constituted the first leg of the government's specific-omitted-item proof. The second leg of proof was approached through the testimony of witnesses and certain records of used car dealers which tended to show that each of the 103 new cars had actually been sold to a used car dealer, either directly or indirectly, and that defendants and agents of Bernard Bros. had received a greater price for each of those cars than that shown by the corporation's books.

The 103 sales fell into two categories, direct and indirect. Adley Lorbeer, Anthony Volante and officers of Stoltz Motors, Inc., which is hereinafter referred to as Stoltz, testified with respect to a number of transactions in the first category. For example, Volante testified that he had purchased new Plymouths from Bernard Bros. in 1948 and that he had dealt with the sales manager George Smith in these transactions. He identified 7 invoices which he had obtained from Bernard Bros. with the delivery of new Plymouths purchased in 1948 from that corporation. Each of those documents identified, by factory

serial number, one of the new automobiles shown by the Bernard Bros. sales journal as having been sold in 1948. He further testified that he had paid exactly $400.00 more than the invoice price for each of the automobiles purchased.

The other direct sale testimony was similar, consisting of the testimony of witnesses and the identification of invoices, checks or business records tending to show the purchase in 1948 by a used car dealer witness of specific new automobiles which could be identified with entries in the Bernard Bros. sales journal. In some instances the government sought to prove the bonus price paid for specific cars by oral testimony. In others, the evidence of amount of bonus payments was reflected upon the car dealer's records.

The second category of transactions, indirect sales, encompassed a majority of the specific transactions to which the government's evidence related. In in direct transactions, new cars were channeled to used car dealers through third parties who were commonly known to the trade as "bird dogs".

"Bird-dogs", Edward Gallagher, Lawrence Fisher, Anthony Antonucci, Raymond Stoltz and Joseph D. Kaziny, were key government witnesses relative to indirect sales.

The testimony of Gallagher is representative of the "bird-dog" evidence adduced by the government. Gallagher testified that he had purchased a number of new cars in 1948 from agents of Bernard Bros. for Nichols Motor Sales, a used car dealer, which is hereinafter referred to as Nichols. He could not recall the dates and auto serial numbers involved in any transaction, but stated that, in each instance, he paid cash for the car purchased and received a Bernard Bros. invoice for each car purchased. He further testified that the car and invoice were delivered by him to Nichols.

Gordon Nichols and other Nichols' employees were then called by the government to lay the foundation for the

introduction of records kept by Nichols relative to the purchase of cars in 1948. Those records, and the testimony relative thereto, tended to prove that Nichols had purchased 35 new cars from Gallagher in 1948 which were shown by the sales journal of Bernard Bros. as having been sold by that corporation.

The evidence of other "bird-dog" transactions followed the same sequence—the testimony of the "bird-dog", followed by introduction of the records of the used car dealer for whom he had purchased new cars.

Although the testimony as to each particular transaction differed, the transactions as to which evidence was adduced were all similar in nature. The witnesses, whether "bird-dog", used car dealer or used car dealer employee, testified as to a sequence of events substantially as follows: Each witness approached one of the defendants, Charles Bernard or Mr. Smith to arrange for the purchase of a new car or cars; the person with whom he dealt would, in each instance, require that the car be paid for in cash for a price above the manufacturer's list price thereof and that the purchaser supply to Bernard Bros. the name of some person, either real or fictitious, to whom the car would be invoiced and in whose name an application for a certificate of title would be executed; an invoice was delivered with each car which showed only the manufacturer's list price as the sales price thereof; and that the car, and the invoice bearing the name supplied by the purchaser, would then be delivered to the purchaser for the agreed cash consideration. Each such car was then offered for sale by the ultimate dealer-purchaser as a "like-new" used car, *i.e.*, a car showing less than 100 miles of use.

The amount of the bonus which the witnesses testified they had paid to the corporation through one of defendants, Mr. Smith or Adelaide Locke Adsit, Bernard Bros. cashier and bookkeeper, varied with the different transactions. The government's evidence with respect to the 103 identified new cars tended to prove that cash "bonuses"

therefor aggregating a minimum amount of $34,108.06 had been paid in 1948 to agents of Bernard Bros. Agent Sharp testified that his inspection of the Bernard Bros. books revealed that all cash bonuses were systematically excluded from the recorded sale price of each car.

The government's case was concluded by the testimony of William Ruggaber, an employee of the Bureau of Internal Revenue. Ruggaber was present in court and heard the testimony of the various "bird-dog" and used-car dealer witnesses. From that testimony and the exhibits in evidence Ruggaber prepared a summary containing his computation of the amount of the cash bonus received by officers and employees of Bernard Bros. upon each of the 103 transactions. Over defendants' objection, a copy of that summary was given to each juror as Ruggaber testified as an expert witness to his evaluation of the primary evidence and the mechanics of his preparation of the summary. After the witness had testified, the summary prepared by him was admitted in evidence as an exhibit and given to the jury, over defendants' further objection, for use in their deliberations.

The major contentions now asserted against the judgment arise out of the summarized procedural aspects of the trial.

A major contention urged by defendants for reversal of the judgment is premised upon the asserted error of a ruling related to the admissibility and use of evidence. As the various "bird-dog" and used-car dealer witnesses testified to transactions and conversations with one, or more, of defendants, Charles Bernard or Mrs. Adsit, admission of the testimony was limited to the particular person to whom it pertained. Near the close of its case, the government moved that such testimony be admitted against all of the parties named in the indictment upon the theory that the evidence tended to prove a common scheme or design between defendants, Charles Bernard and employees of Bernard Bros. to sell new cars for bonus prices, in the furtherance of which each party had acted as agent

for each of the other parties. Over defendants' objection, the government's motion was allowed, and all of the evidence, with certain specific exceptions noted, was admitted as competent evidence against each of the defendants named in the indictment.

Defendants now assert that the trial court, by so ruling, permitted them to be convicted of conspiracy, a crime not charged in the indictment. That premise overlooks and misconstrues the theory upon which the government's motion was made and allowed by the court. In moving that evidence admitted as against the individual defendants be admitted as against all defendants, the government relied upon the principle of vicarious responsibility of all joint venturers for all acts done and statements made in furtherance of the object of the joint scheme or undertaking. As a preface to its ruling allowing the government's motion, the court said, in pertinent part:

> "But the broad terms of the indictment would imply that there was a common design or a common plan to defraud the government, with only one exception.
>
> "There was very extensive cross-examination by counsel for the defendants. They examined into each and every area. The one exception was Mr. Walsh, as to one of defendants in this case.
>
> "Under the circumstances, I feel that the motion of the Government at this time could not be construed to be taking the defendants by surprise, so that they did not have an adequate opportunity to cross-examine as to the various issues in the case; and I therefore hold that the testimony and the exhibits in each and every case, with the exception of those outlined will apply to all defendants in the case; and the motion of the Government is allowed."

In its charge to the jury on this phase of the case, the court said, in pertinent part:

> "When men enter into an agreement for an unlawful end, they become agents for one another. What one

does pursuant to the common purpose, all do, and declarations, statements or conversations by one in furtherance of the common design and during its continuance are competent against all.

"During the course of the trial, various testimony and exhibits were received in evidence only as to certain defendants, and you were instructed that such evidence was not then to be considered against any defendant to whom the evidence did not pertain. Later, near the close of the government's case you were instructed that such evidence, with certain exceptions, had been admitted as to all defendants and that you might consider such evidence as pertaining to all defendants.

"If you now find beyond a reasonable doubt from all the evidence in this case that there was a common plan or design to engage in a general course of corporate business transactions of the type shown by the evidence, you may consider all the acts [of each of the individual defendants as evidence pertaining to all.]

"On the other hand, if you find from all the evidence that such a common plan or design was not shown beyond a reasonable doubt then you will consider the acts and declarations of each defendant only as to him and not to any other defendant."

From our review of the record, it is apparent that we are dealing in this phase of the case with a question of the admissibility of evidence only, not one of any amendment of the substantive charge of the indictment. The evidence complained of was admitted by the court and submitted to the jury upon a theory of the vicarious responsibility of all joint ventures for all acts done and declarations made by each in furtherance of the joint undertaking. The question whether a common plan or design was proved beyond a reasonable doubt was properly submitted to the jury.

Authority for the ruling is found in *Reistroffer* v. *United States*, 8 Cir., 258 F.2d 379, 386-388; *United States* v. *Pugliese*, 2 Cir., 153 F.2d 497, 500; *United States* v. *Olweiss*, 2 Cir., 138 F. 2d 798, 799-800, cert. denied 321 U.S. 744. To the same effect is *American Fur Co.* v. *United States*, 2 Pet. (27 U.S.) 358, 364-365. We find no analogy between the ruling in this case and the case of *Stirone* v. *United States*, 361 U.S. 212, upon which defendants' principal reliance is placed. There the indictment charged that Stirone had interfered with the movement of certain sand in interstate commerce by an act of extortion. When the government's evidence tended to prove that the statute of limitations barred prosecution for interference with the movement of sand, the court allowed the introduction of evidence tending to prove interference with the interstate movement of steel manufactured by a steel mill constructed from the sand alleged in the indictment. In reversing the judgment of conviction, the Supreme Court held that the latter evidence related only to substantive acts not charged in the indictment, and that the admission of such evidence had the effect of permitting the government to amend the indictment against Stirone by the use of evidence.

We hold that the court's ruling admitting the evidence against all defendants was proper.

Error is assigned upon the admission by the court of numerous documents and books from the records of the used-car dealer witnesses. The exact contention of defendants upon this phase of the case, as embodied in their brief, defies precision of statement. Their apparent contention is that it was in some manner unjust and prejudicial to permit the Bernard Bros. books which were compact and well arranged to be contradicted by used-car dealer records and documents which were in some instances incomplete and, in part, inaccurate.

From time to time as the trial progressed, the purchase journal of Nichols, the "police books" of Park Motor Sales, Atlas Motors and Stoltz, stock cards of Parks, en-

velopes kept by Atlas for each car purchased, invoices identified as having been issued by Bernard Bros., and cancelled checks and check stubs of several used-car dealer witnesses were admitted as exhibits. We do not deem it necessary to set forth in detail the description or trial history of each document. We have examined the foundation laid for the introduction of the documents in each instance, and we conclude that all were properly admissible as records made in the regular course of a business, 28 U.S.C. §1732(a); *Palmer* v. *Hoffman*, 318 U.S. 109, 112-114; *United States* v. *Wicoff*, 7 Cir., 187 F.2d 886, 889, or as documents corroborating the oral testimony of witnesses.

Defendants' argument, that some of these business record exhibits were demonstrated to be inaccurate in certain respects goes to the weight or credibility of the documents, not to any question of admissibility. As we observed in *United States* v. *Wicoff*, 7 Cir., 187 F.2d at 889 "Title 28 U.S.C.A. §1732 provides for the admissibility of books and records made in the regular course of business, but does not require that they be correct in all respects." Accordingly, we will devote further discussion of this phase of the case to only two of several specific contentions.

The court admitted the check stub records of Nichols. Gordon Nichols identified the stubs of checks written in the course of various transactions for the purchase of specific cars in 1948. These stubs, variously, showed that the checks were payable to cash or to one of the proprietors of Nichols. In addition, each stub upon which the government's case depends bore the written notation, "Gallagher". Mr. Nichols testified that the name of the "bird-dog" was regularly noted upon the stub of each check written for the purchase of an automobile from a "bird-dog"—that the notation, "Gallagher", upon each of the stubs introduced in evidence denoted that the check had been issued for the purchase of a car from Gallagher.

We hold that the check stubs and explanatory testimony were properly admitted in evidence, upon the foundation testimony that the stubs were regularly prepared in the conduct of Nichols' business. The circumstances of the placement of the notation, "Gallagher", upon particular stubs, and the necessity for explanatory testimony, affect the weight and credibility of the evidence, not the admissibility. *Bodnar* v. *United States*, 6 Cir., 248 F.2d 481, 482-483.

We conclude that defendants' contention against the admissibility of the "police books" of Atlas and Stoltz also lacks merit. Each of those books was kept pursuant to the provisions of an Illinois statute, (now I.R.S. 1959, c. 95½, Sec. 5-401), which required all car dealers to keep records containing sufficient information as to the identity of cars purchased and sold to aid law enforcement officials in the enforcement of the motor vehicle theft laws. Both Atlas and Stoltz entered upon their "police books" the price for which each automobile had been purchased, in addition to the information which the statute required. The foundation testimony disclosed that the amount of the purchase price of each car was customarily recorded in the "police book" as a regular record entry. It is wholly frivolous to contend, as defendants do, that the character of such books as a record made in the regular course of a business is destroyed merely because more information was recorded therein than the State statute required.

The distinction between *Hartzog* v. *United States*, 4 Cir., 217 F.2d 706, and *Bruce* v. *McClure*, 5 Cir., 220 F.2d 330, upon which defendants principally rely in their argument against the admissibility of these records, is readily apparent upon reading the reported opinions in those cases.

We have examined the circumstances of the trial court's admission in evidence of the summary prepared by Ruggaber, and we hold that the admission of that summary was not error. The use of charts and summaries of voluminous records and testimony, as secondary evidence, has

been approved in *United States* v. *Johnson*, 319 U.S. 503; *Somberg* v. *United States*, 7 Cir., 71 F.2d 637; *Smith* v. *United States*, 6 Cir., 239 F.2d 168, cert. denied 353 U.S. 983; *Corbett* v. *United States*, 9 Cir., 238 F. 2d 557, cert. denied 352 U.S. 990; *Blackwell* v. *United States*, 8 Cir., 244 F.2d 423, cert. denied 355 U.S. 838, among other cases. In *Lloyd* v. *United States*, 5 Cir., 226 F.2d 9, one of the cases upon which defendants principally rely, the court stated that admission of charts made by government agents summarizing the basic evidentiary facts is discretionary with the trial court and that the court's exercise of discretion in that regard can be reviewed only upon a clear showing of abuse and resulting prejudice to the accused person. Although the court there expressly disapproved the inclusion of certain conclusionary statements in summaries admitted in evidence, the reversal of the judgment was on other grounds. The court, expressly, did not decide whether the use of the charts was prejudicial error.

The Ruggaber summaries were admitted by the court as summaries of the primary evidence, only, and not as primary evidence within themselves. Examination of the record discloses that defendants were afforded full opportunity to cross-examine Ruggaber with respect to the summaries and his method of making the same. With respect to the testimony of Ruggaber, the court instructed the jury that his testimony was entitled to weight as evidence only to such extent as the jury should find that the primary testimony of other witnesses and the exhibits upon which his expert testimony was based was entitled to weight and credibility. With respect to the Ruggaber summaries, the court stated in its charge to the jury:

> "Such exhibit has no independent value. If you choose to disregard as evidence all or a part of the testimony of any witness in this cause or do not accept the correctness of any document admitted into evidence, then you must likewise disregard so much of the summary as is based upon the testimony of such witnesses and such documents you decide so to disregard."

Those instructions meet all of the requirements for the use of such evidence as set forth in the cases above cited.

Equally wanting in merit is the defendants' contention that the evidence was insufficient to sustain their conviction. Defendants' argument is premised principally upon the contention that the evidence tended to show only that "under-the-table" payments were received by various individuals, including defendants, but that there is a lack of proof that such "under-the-table" payments were ever received by the corporation. The court correctly charged the jury that monies received by officers and agents of a corporation in the sale of property offered for sale by the corporation is corporate income. *Burger* v. *United States*, 8 Cir., 262 F.2d 946, 955-956. It is immaterial that all or a part of that money may have been embezzled from the corporation by the person who received it as defendants suggest. Assuming, arguendo, that that contention is a fact, the money received was none the less corporate income. *Burger* v. *United States, supra.* The cases of *Rutkin* v. *United States*, 343 U.S. 130, *Briggs* v. *United States*, 4 Cir., 214 F.2d 699, and *Davis* v. *United States*, 6 Cir., 226 F.2d 331, upon which defendants rely are inapposite. Each dealt only with the question whether funds embezzled from a corporation, or received by an individual through extortion, constituted taxable income to the individual.

Upon the evidence the jury could find that defendants systematically omitted cash bonus payments from the Bernard Bros. books and from the 1948 corporation tax return in a wilful attempt to evade a substantial part of the income tax due for that year.

Defendants contend that the court erred in its charge to the jury and in its refusal to give certain instructions tendered by the defendants. We have examined the court's charge to the jury as a whole, and we conclude that the jury was correctly instructed. The charge, as a whole, is both complete and fair to the defendants.

That conclusion might well dispose of the whole of defendants' many contentions against the charge given, but we deem it advisable to mention briefly several specific points raised.

During the trial of the case the court permitted the use of grand jury minutes in questioning the witness, Edward Gallagher. In its charge, the court cautioned the jury that it might consider those questions and answer read from the grand jury minutes only in so far as they tended to impeach Gallagher. That statement was part of the charge to the jury relating to the impeachment of witnesses. A cautionary instruction was necessary in view of the use of the grand jury minutes and the charge given correctly stated the law.

The charge with respect to accomplice testimony was a correct statement of the law. *United States* v. *Echeles*, 7 Cir., 222 F.2d 144, cert. denied 350 U.S. 828; *Delvalley* v. *United States*, 7 Cir., 88 F.2d 579, and was necessary to present the testimony of George Smith to the jury in proper perspective.

The charge given with relation to the fact that defendants did not testify was in compliance with the principles stated in *Brun* v. *United States*, 308 U.S. 287, and was essentially identical to the instruction which we approved in *United States* v. *Fleenor*, 7 Cir., 162 F.2d 935.

The charge given with respect to the weight to be given to character witness testimony is essentially identical to the charge which we approved in *United States* v. *Echeles*, 7 Cir., 222 F.2d 144, cert. denied 350 U.S. 828. We distinguish *United States* v. *Semeniuk*, 7 Cir., 193 F.2d 508, upon authority of the *Echeles* case.

In summary, upon consideration of the court's charge to the jury as a whole, we find that the jury was correctly instructed as to the elements of the offense charged, as to the rules for the jury's consideration of, and weight to be given to, the evidence, as to the respective functions of jury and trial judge, as to the use of the evidence

against the various defendants and as to the proper respective positions of the government and the defendants with relationship to the burden of proof and the presumption of innocence. We find the court's charge to have been eminently fair to the defendants and complete in every necessary respect. We therefore reject all contentions of defendants with relation to the propriety of the court's charge, and the rulings upon tendered instructions.

Finally, defendants contend that written reports made by agent Sharp to the government reveal that the affairs of the witnesses, Smith, Kaziny and Gallagher, were under investigation by the Bureau of Internal Revenue simultaneously with the investigation of the affairs of Bernard Bros. By their supplemental brief, defendants contend that the court's ruling denying them access to such reports prevented them, on cross-examination of Sharp, from exposing and developing any promise of leniency, or other relationship, between Sharp and the government, on the one hand, and Smith, Kaziny and Gallagher, on the other.[2]

In *United States* v. *Killian*, 7 Cir., 275 F.2d 561, Pet. cert. pend'g, we held that the Jencks Act, 18 U.S.C. §3500, requires the production only of such written statements and reports as are related to the subject of a witness' direct testimony. The fact and the timing of any investigation of Smith, Kaziny and Gallagher have no relevant relationship whatsoever to Sharp's direct testimony. The demand for production of the statements in question was properly denied.

This is not a case comparable to *United States* v. *Sheer*, 7 Cir., 278 F.2d 65, or *United States* v. *Berry*, 7 Cir., 277 F.2d 826, in which there was a failure to produce for the court's examination statements and reports made by government witnesses which related to the subject matter of the issues of the trial.

We have carefully considered the many other contentions, and subcontentions, of defendants' shot-gun ap-

[2] After Sharp had testified on direct examination, defendants invoked the Jencks Act, 18 U.S.C. §3500, and demanded that all written statements and reports made by Sharp and related to his Bernard Bros. investigation be produced for their inspection and use. The trial judge ordered that all such

proach to their attack upon the judgment of conviction. We have concluded that all are without merit, and that further specification or discussion thereof would only lengthen an already overlong opinion.

The judgment is reversed as to Charles E. Bernard. The judgment as to the defendants, Leonard M. Bernard and James B. Jackson is affirmed.

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[2] (Continued)

statements and reports be produced by the government for inspection by the court *in camera*. See *United States* v. *Kelhan*, 7 Cir., 275 F. 2d 561, Pet. cert. pend'g. After his *in camera* inspection of the reports, the trial judge ordered that certain reports, and parts of other reports, be delivered to defendants. The court then ordered that all other statements and reports to which defendants had been denied access be sealed in order that they might be available for any appeal.

Through oversight, one of two envelopes containing such reports was not sealed when the record was transmitted to this court. Defendants' examination of the contents of that unsealed envelope forms the basis for their Jencks Act argument.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1960 — APRIL SESSION, 1961

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LEONARD M. BERNARD, CHARLES E. BERNARD and JAMES B. JACKSON, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 6, 1961

ON PETITION FOR REHEARING.

Before HASTINGS, *Chief Judge*, DUFFY, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. We have considered the decision and opinion of the United States Supreme Court in *Clancy* v. *United States*, decided February 27, 1961, which is cited by defendants in their petition for rehearing. In the *Clancy* case, the defendants' demand that memoranda prepared by government-agent witnesses be produced for their inspection pursuant to the provisions of the Jencks Act, 18 U.S.C. 3500, was denied by the trial judge because the written memoranda in question had not been made "contemporaneously" with the conversations therein reported. The Supreme Court reversed a judgment of conviction upon the narrow ground that the trial judge had employed an improper standard of decision in his ruling upon the Jencks Act request, inasmuch as that Act does not require, as a condition fo. compelling their production, that statements by government witnesses be made contemporaneously with conversations and interviews therein reported.

In the case at bar the trial court employed the correct statutory standard in his rulings upon defendants' request for production of written statements and reports made by agent Sharp. The *Clancy* decision has no application here.

Although we did not so expressly state in our opinion in this case, government's Exhibits 84-A and 84-C have been examined by the court. Exhibit 84-A consists of the complete, unexcised report of internal revenue agents which was signed by Sharp. Exhibit 84-C consists of the portions which were excised by the trial judge after his *in camera* examination of that complete report. From our examination of those exhibits, we conclude that the materials contained in Exhibit 84-C were properly excised from Sharp's report prior to the submission of that report to defendants for their inspection.

The petition for rehearing is denied.

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No. 946

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEONARD M. BERNARD AND JAMES B. JACKSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a–19a) is reported at 287 F. 2d 715.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1961 (Pet. 1a) and a petition for rehearing was denied on April 6, 1961 (Pet. 18a). The petition for a writ of certiorari was filed on May 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error in telling the jury, near the end of the trial,

that it might consider all the evidence as having been received against all defendants, where the court's final charge made it clear that the acts and declarations of each defendant should be considered only as to him unless the jury was satisfied beyond a reasonable doubt that the evidence showed a common plan or design.

2. Whether the trial court erred in admitting in evidence the government expert's summaries of unreported income, where each item was clearly established by testimonial or documentary evidence, and where the court gave careful "guarding instructions" as to the use to which the jury could properly put the summaries.

3. Whether the trial court erred in admitting in evidence certain records, kept in the regular course of business, under the federal shop-book statute, 28 U.S.C. 1732.

4. Whether the trial court erred in excising, as required by 18 U.S.C. 3500, those portions of a government witness' statement which did not relate to the witness' testimony on direct examination, before turning the statement over to defense counsel for cross-examination purposes.

STATUTES INVOLVED

Section 145 of the Internal Revenue Code of 1939 provides in pertinent part:

> SEC. 145. PENALTIES.
>
> * * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, ac-

count for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. (1952 ed.) 145(b))

28 U.S.C. 1732(a) provides:

SEC. 1732. RECORD MADE IN REGULAR COURSE OF BUSINESS; PHOTOGRAPHIC COPIES.

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

* * * * *

STATEMENT

On March 4, 1955, petitioners, together with Charles E. Bernard and Adelaide Locke Adsit, were indicted in the United States District Court for the Northern District of Illinois for the wilful attempted evasion of a large part of the 1948 income taxes of Bernard Bros., Inc. (hereinafter referred to as "the corporation"), by filing a false and fraudulent corporate tax return (R. 1, 5).[1] The government filed detailed bills of particulars, alleging specific items of unreported income totaling $78,053.82, which were said to have been received from "bonuses on the sale of 215 new automobiles to thirteen different customers of the corporation" (R. 6); and alleging the name of each customer, the date of each sale, the amount of the unreported income received in cash as a bonus on each of those sales, the person who made each bonus payment, and the agent of the corporation to whom each was made (R. 6-23). After a five-week trial before a jury in 1959, petitioners and Charles Bernard were found guilty as charged, the court having directed a verdict of not guilty as to Mrs. Adsit (R. 3, 1981, 2010, 2015-2016). Petitioner Leonard Bernard was sentenced to eighteen months in prison and fined

[1] The appellants' appendix in the court below, consisting of four volumes with pages numbered 1 to 2,030, is designated by the symbol "R." "Gov. App." refers to the government's appendix in the court of appeals.

$10,000; Charles Bernard was sentenced to six months and one day in prison and fined $5,000; and petitioner James Jackson was placed on probation for two years (R. 2019–2023). The court of appeals reversed the conviction of Charles Bernard for insufficient evidence and affirmed as to the two petitioners (Pet. 2a, 17a).

The evidence may be summarized as follows:

During the year 1948, the corporation conducted business as a dealer and distributor of automobiles in Evanston, Illinois (R. 1991). Leonard Bernard was president of the corporation, Charles Bernard was vice-president, James Jackson was treasurer (R. 1992), and Mrs. Adsit served as secretary to Leonard Bernard and as cashier (R. 86, 1098, 1492). Although Leonard Bernard stated to the Treasury agents during their investigation that everything he or the corporation had collected from the sale of cars was reflected on the books and the corporate income tax return (R. 43), the investigation disclosed an elaborate scheme by which many cars were sold for a cash bonus or premium ("overage") in addition to the invoice price recorded on the books and reflected in the corporate tax return. For example, one Gallagher purchased 35 cars on behalf of Nichols Motor Company from the corporation in 1948, usually dealing with Leonard Bernard. The corporation received a total "overage" (in excess of the prices shown on the sales invoices) of $10,530.71 on these cars (R. 83, 1995, 1997–1998). One Antonucci purchased fifteen new cars from the corporation during 1948, usually dealing with Jackson, on each of which he paid a minimum "overage" of $250 in addition to the invoice price (R. 778–782,

1995, 2001). He testified that in making the payments he would "count out the list price and count out the overage on the side" (R. 783–784). When Antonucci bought a car for his personal use, he was obliged to pay a premium of $550 over the invoice price (R. 784). One Volante purchased seven cars from the corporation and in each case—pursuant to an agreement between himself and George Smith, the corporation's sales manager—paid Smith $400 in cash over the invoice price (R. 1576).

When Smith sold cars he turned over to the cashier, Mrs. Adsit, the amount of money necessary to cover the invoice price and gave the "overage" to petitioner Leonard Bernard in cash (R. 1492). If Leonard Bernard was out of town, Smith—acting on Leonard Bernard's instructions—would either hold the cash until he returned, or mail it to him (R. 1495, 1500). On one occasion Smith sent the cash by registered mail, but never did so again because Leonard Bernard called him on the phone and instructed him not to (R. 1495–1496). Leonard Bernard sold more cars involved in "overage" transactions than anyone else in the corporation (R. 80–83, 462–465, 732, 887, 890, 1033, 1041, 1096, 1377–1378), but petitioner Jackson also participated in such transactions and in some instances accepted payment for the cars (R. 732, 777, 890, 1041, 1098). Five other witnesses, in addition to Gallagher, Antonucci and Volante, testified to similar transactions, all involving over-invoice bonus payments made in cash either to one of petitioners, Charles Bernard, Adelaide Locke Adsit, or George Smith (R. 738, 886–888, 893–898, 976–979, 1033–1040,

1095–1099, 1103, 1136–1149, 1380, 1407–1419, 1561–1576, 1997–2003).[2]

Since the corporate books, on which only the selling prices shown on the invoices were entered (R. 59–61), were in perfect agreement with the tax return (R. 46, 59)—which was signed by both petitioners (R. 1991)—none of the under-the-table "premiums" or "overages" were reported as income. The total amount of income thus proved to have been suppressed (involving 103 cars) was $35,108.06 (R. 1995–2003).

ARGUMENT

1. Petitioner's primary contention (Pet. 14–19), that the trial court erred in telling the jury that it might consider all of the evidence (with certain specified exceptions) as having been received against all of the defendants (R. 1816), is plainly without merit. Standing alone, this statement is not complete since, before evidence relating to one defendant can be considered against other defendants, the jury must find either a conspiracy or a common plan or design. But petitioners were clearly not prejudiced, since in his final charge to the jury the trial judge specifically explained this statement in instructing the jury that it could consider the acts and declarations of each of the defendants against each of the other defendants, only if it was satisfied beyond a reasonable doubt "that there was a common plan or

[2] The purchasers of the cars involved in the "overage" transactions were usually given false names on the corporation's records, often names of persons related to the purchaser or connected with the Bernards (see, *e.g.*, R. 271, 1478).

design to engage in a general course of corporate business transactions of the type shown by the evidence. * * * On the other hand, if you find from all the evidence that such a common plan or design was not shown beyond a reasonable doubt then you will consider the acts and declarations of each defendant only as to him and not as to any other defendant" (R. 1959–1960). Thus, contrary to petitioners' contention (Pet. 15), the trial judge left for the jury the determination whether the evidence proved any common plan or design.

It is well settled, as the court below pointed out (Pet. 9a), that the trial court's instruction was correct. "Although conspiracy be not charged, if it be shown by the evidence to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all." *Davis* v. *United States*, 12 F. 2d 253, 257 (C.A. 5). Accord: *American Fur Co.* v. *United States*, 2 Pet. 358, 365; *Neal* v. *United States*, 185 F. 2d 441, 442 (C.A. D.C.), certiorari denied, 340 U.S. 937; *Ladrey* v. *United States*, 155 F. 2d 417, 420 (C.A. D.C.), certiorari denied, 329 U.S. 723; *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); *Lee Dip* v. *United States*, 92 F. 2d 802, 803 (C.A. 9), certiorari denied, 303 U.S. 638. See also *Hamburg-American Steam Packet Co.* v. *United States*, 250 Fed. 747; *United States* v. *S. B. Penick & Co.*, 136 F. 2d 413; 2 Wharton, *Criminal Evidence* (11th ed.), pp. 1108–1109; IV Wigmore, *Evidence* (3d ed.), Sec. 1078. *United States* v. *Pronger*, 287 F. 2d 498 (C.A. 7), and *Stirone* v. *United States*, 361 U.S. 212, relied upon by petitioners (Pet. 15–18), are plainly inap-

posite. In the *Pronger* case the comments of the trial judge "had the effect of telling the jury that the * * * common design * * * had been proved" (287 F. 2d at 500). In the case at bar that question was properly left to the jury (see *supra*, pp. 7–8). In the *Stirone* case, the trial court permitted the jury to find the defendant guilty of a substantive offense not charged in the indictment, with the result that the government was, in effect, permitted to amend the indictment in the middle of the trial. Here, only a rule of evidence is involved; if the jury found a common design, the evidence could be considered with regard to all the defendants, but of course they could not be found guilty of the offense of conspiracy.

Petitioners' highly experienced trial attorneys could hardly have been taken by surprise by the trial court's ruling, because the indictment (R. 5) clearly implied a common design or plan to attempt to evade the corporate income tax and the three bills of particulars (see *supra*, p. 4) set forth a pattern of conduct by which the corporation did not charge "factory-suggested prices," but insisted upon receiving, and did receive, cash "overage." At trial, both petitioners were shown by the direct evidence of numerous witnesses, corroborated by documentary evidence, to have been parties to the plan to evade taxes.[3]

[3] Petitioners (Pet. 19) raise the frivolous question whether the "overages" constituted embezzled funds, extorted funds, or gratuities. Petitioners attempt (Pet. 3) to characterize the "overages" as "cash gratuities in excess of sales prices for automobiles sold by their employer" which were retained by the particular employee who made the sale. But, as the trial court instructed the jury, "Moneys received from the sale of

2. Petitioners claim (Pet. 20) that the trial court erred in admitting in evidence the summaries of unreported income prepared by the government's expert accountant (see R. 1997–2003). It is well settled, however, that summaries of this kind are admissible when based upon testimony and documents introduced in evidence. *United States* v. *Kelley*, 105 F. 2d 912, 918 (C.A. 2); *Graves* v. *United States*, 191 F. 2d 579, 584 (C.A. 10); *Bell* v. *United States*, 185 F. 2d 302 (C.A. 4), certiorari denied, 340 U.S. 930; *Hanson* v. *United States*, 186 F. 2d 61, 67 (C.A. 8); cf. *Holland* v. *United States*, 348 U.S. 121, 127–128; *United States* v. *Johnson*, 319 U.S. 503, 519. The trial judge gave careful "guarding instructions" (*Holland* v. *United States, supra*) as to the weight to be attached to the testimony of the government's expert (R. 1960); and as to the use to which the government's summaries might be put (R. 1658–1659), pointing out that they had "no independent value" and must be rejected by the jury to the extent that the underlying testimony or documents were rejected (R. 1961). Petitioners, of

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corporate property by corporate officers or employees acting in the course of their duties constitute corporate receipts" (R. 1958). The "overages" were obviously a part of the consideration for the sale of the cars, and direct evidence showed that they were not retained by the employees but were turned over to Leonard Bernard, the president of the corporation (see *supra*, p. 6). And the trial court's instructions to the jury clearly required the jury to find that the "overages" were taxable to the corporation before it could find the defendants guilty (R. 1956–1958).

Equally frivolous is the contention (Pet. 19–20) that the trial court erred in refusing to instruct the jury that the guilt or innocence of each defendant must be determined separately, since the jury was so instructed (R. 1964–1965).

course, had the right to introduce their own charts and summaries (R. 1931), but for reasons of their own chose not to take advantage of the opportunity.

The record does not support the assertion (Pet. 20) that the government's expert improperly made arbitrary appraisals of the evidence. There was little room for any evaluation of conflicting evidence since the only conflict was a slight one involving a series of fourteen transactions where the expert relied on documentary evidence rather than a witness' recollection (R. 1766–1780). If the witness' oral testimony had been followed exclusively, the unreported income attributed to the corporation would have been $10.53 more; if the documentary evidence or oral testimony had been used, depending on which was most favorable to defendants in each instance, the unreported income would have been $419.26 less (R. 1643–1647). Clearly, this conflict was not of substantial importance.

3. Petitioners contend (Pet. 21) that the trial court erred in admitting in evidence certain records—mostly belonging to the Nichols Motor Company[4] which pur-

[4] Gordon Nichols, who had been manager and co-owner of the Nichols Company, testified that its purchase journal had been kept in the regular course of business of the company during 1948 (R. 71). The bookkeeper of the company testified that she had maintained that record; that it was all in her own handwriting; that the entries therein were true and correct to the best of her knowledge; that the underlying sources of information for the entries were stock cards which were made up for each car, the invoices delivered with the cars, or the automobiles themselves; that, when the serial number was obtained from either the car or the invoice, it would be entered on the stock card which was the basis of all the business transactions of the Nichols company and which was made out for all the cars

chased cars from the Bernard corporation—under the federal shop-book statute (28 U.S.C. 1732) on the ground that they were false and untrustworthy. The only falsity specifically claimed by petitioners relates to the name of the person who, according to the books of the Nichols Motor Company, was the owner of a car sold to that company (R. 187–188). Actually, the car was bought from the Bernard corporation. This is, however, a matter which did not relate to the central issue of the price at which the car was sold and was caused by the defendants themselves, since this information apparently came from an invoice supplied to Nichols by the Bernard corporation (see R. 541–542). This minor falsity in one entry and the alleged untrustworthiness of other entries in some respects could have been used—and indeed was used (Gov. App. 47)—by petitioners in an attempt to impress the jurors with the lack of credibility of the evidence. However that may be, the admissibility of the records was clearly not affected. *Palmer* v. *Hoffman*, 318 U.S. 109, 112, 115; *Bodnar* v. *United States*, 248 F. 2d 481, 482 (C.A. 6); *United States* v. *Wicoff*, 187 F. 2d 886, 889 (C.A. 7).

4. Petitioners urge finally (Pet. 21–24) that (a) the trial court misapplied the so-called "Jencks statute," 18 U.S.C. 3500, or (b) that statute is unconstitutional insofar as it restricts a defendant's right to examine the entire contents of written statements by

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on the premises (R. 535–542). Extensive cross-examination of the bookkeeper served only to show further her familiarity with the books and the regularity with which they were kept (R. 555–583).

a government witness "to show the relationship of a witness to the prosecution * * *" (Pet. 24). These contentions are without substance.

(a) The trial judge examined the statements of Sharp, the government witness in question, and, as 18 U.S.C. 3500 expressly requires, excised those portions which did not relate to the witness' testimony on direct examination before turning them over to defense counsel. At petitioners' request, the relevant materials were sealed and were before the court of appeals for its examination (R. 1857–1860). That court examined the exhibits, including the part excised by the trial judge in his *in camera* inspection, and concluded that all the excisions were proper (Pet. 19a).[5]

(b) There is no merit in the suggestion (Pet. 24) that 18 U.S.C. 3500 is unconstitutional as applied to these petitioners, because it narrows the range of the holding in *Jencks* v. *United States*, 353 U.S. 657. This Court has held that 18 U.S.C. 3500 was intended to limit the production of government papers to the very extent that the district court held in this case. The major concern of the statute is "with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which * * * do not relate to the subject matter of the witness' testimony." *Palermo* v. *United States*, 360 U.S. 343, 354. And the Court has likewise held that the Jencks statute, not the case, is the sole standard governing production of reports of a government

[5] At least as late as three weeks after the filing of the petition for certiorari, petitioners had not caused these exhibits to be certified to this Court.

witness. *Id.* at 355; *Rosenberg* v. *United States*, 360 U.S. 367, 369. If a statement of a government witness cannot be produced under the terms of 18 U.S.C. 3500, it "cannot be produced at all." *Palermo* v. *United States, supra*, 360 U.S. at 351.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

No. 946

REPLY TO
BRIEF FOR THE UNITED STATES IN OPPOSITION
TO PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM, 1960.

No. 946

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Petitioners,

vs.

UNITED STATES OF AMERICA,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

It is respectfully submitted that in its Brief in Opposition, the United States has undertaken to avoid answers to the questions presented, and seeks to convince the Court that in lieu of substantial questions presented by the Petition, the matters are really of no substance.

This desired result is attempted by misinterpreting the questions presented and distorting the facts upon which the petitioners' questions and petition are based.

In its characterization of the questions presented, the government states (Br. 1, 2) that the first question is whether the trial court committed prejudicial error in telling the jury, near the end of the trial, that "it" *might* consider all of the evidence as having been received against all defendants. (Emphasis supplied).

Examination of the record at R. 1816, shows that during the reception of government evidence, and near its close, the Court instructed the jury

> "You *are to consider* all of the admitted evidence offered by the Government, with the exception of the three specifications that I have specifically noted, as having been received against all of the Defendants. Thank you." (Emphasis supplied).

At page 7 of its Brief, the government confesses that this statement by the Court was not complete. Of course, it was more than not complete. It effectively implied to the jury that the Court now found a conspiracy to exist and was applying the law of agency, making each defendant responsible for all the acts and conversations of all of the others, with three stated exceptions.

There could be no misunderstanding, since this instruction during the taking of government evidence, occurred on June 9, 1959, in a trial begun on May 11, and the action was taken upon a motion made by the prosecutor *in the presence of the jury.* It is respectfully submitted that a reading of the proceeding at pages 1814 to 1817 of the defendants' Appendix, referred to by the government as R. for Record, will throw light upon the jury effect.

No instruction of the Court corrected, changed or modified the erroneous instruction given at R. 1816.

Even if the final charge of the Court on this subject; R. 1959, 1960, was conceded to be correct, which it is not, the conviction would then rest upon an equivocal instruction on a crucial issue contrary to the decision of this Court in *Bollenbach* v. *United States*, 226 U.S. 607, 613.

The government has not seen fit to discuss the propriety of the procedure other than to state that experienced trial attorneys could not have been taken by surprise, Br. 9. Suffice it to say that the petitioners' trial attorneys were not experienced in meeting the novel motion of the government or the erroneous and confusing charge of the Court as portrayed at R. 1814-17 and R. 1959, 1960.

The evidence showed that Bernard Bros. Inc., the corporation involved, had sold almost two million dollars worth of automobiles, services and supplies during the calendar year in question. Even under government evidence, taken at its best, 103 of more than 800 automobiles were involved in over-invoice transactions by various employees of the corporation. The government's proof showed $35,000.00 of over-invoice bonuses or gratuities given or paid by customers to respective individual employees. The Court's use of the phrase "a common plan or design to engage in a general course of corporate business transactions of the type shown by the evidence", R. 1959, 1960, was, under the facts, ambiguous and confusing and certainly did nothing to correct the error. This authorized the jury to find the defendants guilty of a criminal plan or design, indeed criminal conduct, by proof of engagement in a general course of corporate business." (See objection to instruction R. 1978).

The government's attempt to distinguish *United States* v. *Pronger*, 287 F. 2d 498 (CA 7), decided by the Court

below, subsequent to the decision in this case, is ineffectual. Contrary to the government's statement at pages 8 and 9 of its Brief, the Court's formal charge during the reception of evidence, and in the final charge, even more effectively than in the *Pronger* case, "had the effect of telling the jury that the • • • common design • • • had been proved" (287 F. 2d 500). In deciding the *Pronger* case, the Court below immediately following the statement above, relied upon by the government, said "If they (the words) did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury."

Again, in the case of *Stirone* v. *United States*, 361 U.S. 212, the government states that "Here, only a rule of evidence is involved" (Br. 9). It is respectfully submitted that in the *Stirone* case and in the case at bar, the basic issue was whether by the application of a rule of evidence, made by an instruction to the jury on how to consider admitted evidence, the charge of the Grand Jury was effectually amended, and it cannot be said with certainty that with a new basis for conviction added, the petitioners were convicted solely on the charge made in the indictment the Grand Jury returned. 361 U.S. 212, 217.

While the government dismisses (footnote Br. 10) as "frivolous", the claim that the trial court erred in refusing to instruct the jury to consider separately the guilt or innocence of each defendant, it supports the dismissal by reference without description, to the fact that alternative verdict forms were given to the Jurors. Of course no citation or argument is furnished to the effect that verdict forms are the equivalent of the requested instruction. This does not rebut the fact that the requested instruction was refused, R. 1932, Pet. 19, and

no explanation is offered for the conviction of Charles Bernard, under these instructions, when his lack of guilt was readily apparent to the Court of Appeals below. Contributory to his demonstrated and admitted erroneous conviction was the instruction to consider all evidence against all defendants and the refusal to instruct that guilt or innocence of each defendant should be considered separately.

The government footnote treatment (See footnote 3, Br. 9, 10) of the questionable character of the funds called "overages" is an attack upon the question as frivolous. In view of the highly important question of wilfulness involved in the commission of the felony charged in this case, a determination of the character of the overages was imperative. It is submitted that if the petitioners received the "overages" in belief of and claim of right, without mutual knowledge of individual activity or amounts, and did not believe the money to be that of the corporation, and the corporation so consensually treated it by never charging it, receiving it or claiming it, or demanding any accounting of it, then the employes' belief that it was the property of each respectively, was consistent with proved facts and belied "willfulness with evil intent and want of justification in view of all the circumstances". *James* v. *United States*, decided May 15, 1961, No. 63 October Term, Supreme Court, 81 S.Ct. 1052, 1056, 1057.

The Chief Justice, in his opinion in the *James* decision, 81 S. Ct. 1052, 1055, discussed income and its definition and said:

> "The language of § 22(a) of the 1939 Code, 'gains or profits and income derived from any source whatever,' and the more simplified language of § 61(a) of the 1954 Code, 'all income from whatever source

> derived,' has been held to encompass all 'accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.' *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431, 75 S. Ct. 473, 477, 99 L. Ed. 483. A gain 'constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it.' *Rutkin* v. *United States, supra*, 343 U.S. at page 137, 72 S. Ct. at page 575. Under these broad principles, we believe that petitioner's contention, that all unlawful gains are taxable except those resulting from embezzlement, should fail."

Bernard Bros. Inc., the corporation whose tax was the subject of the charged claim of attempted evasion, never acquired or claimed control or practical economic value of the funds in question.

It is respectfully submitted that there is a highly important question, crucial to proper determination of this case, as to whether these overages were not properly considered by the petitioners and their fellow employees as personal income, for which they were not accountable to the corporation, but upon which they were individually liable for personal income tax.

To frustrate consideration by this Court of the problems suggested by Petitioners' Questions No. 1 to 4 (Pet. 3, 4), the government has distorted the plain evidence in this case in its footnote at page 10 of its Brief, where it says,

> "The 'overages' were obviously a part of the consideration for the sale of the cars, and direct evidence showed that they were not retained by the employees but were turned over to Leonard Bernard, the president of the corporation (see *supra*, p. 6)."

This is a false conclusion and a false statement of the facts.

The truth is that with the exception of the testimony of Smith, who was excused from indictment, no employe, officer or agent of the company paid any part of his or her respective overage to any other person, under the evidence.

The government's position would be quite tenable if this false impression of the evidence was sustained by the record.

II.

The government's admission that the summary witness made some appraisal of the evidence, but not much, is significant that the principle urged by petitioners is established by the evidence, Br. 11. The degree of prejudice should be a matter for future argument.

However, the argument of the government, (Br. 10, 11), as its second point, begs or rather blithely ignores the principal error. At pages 1995 to 2003 of the certified Appendix, referred to by the government as "R." (Record), government exhibits 76A, 76B, 76C and 76D are reproduced and are certified to this Court.

Without any concession concerning the contents of the charts, that is, names and figures, admittedly arrived at by the witness by evaluation and selection of evidence, the Court is requested to consider the headings of the columns of figures on exhibits 76B, C, and D. Among these are "Purchase price to car dealer", "Amt. retained by Witness who Bgt. (bought) car", and the final invasion of the jury's province, "Understatement by Bernard Bros. Inc."

This last was, of course, a crucial issue and involved analysis of all of the factual and legal problems in the case.

No "guarding instructions" were given against this heading, and it is unlikely that any could be effective.

The purpose of the exhibits was to place a powerful and lingering argument that "overages" were corporate income before the jury in such fashion that the argument would continue its self-asserting force during jury deliberation.

From the facts proved, it is consistent to say that the petitioners and acquitted defendants, without formal consent of the corporation, but with actual freedom to accept, received the "overages" as additional compensation.

If these free lance bonus payments in 1948—an unusual economic period—(after O. P. A., but during a manufacturer-imposed and enforced car quota and suggested price period) were considered as consensually permitted reward, compensation, or bonus to employees, then, of course, they were deductible as compensation paid to experienced, scarce and valuable employees and officers.

The tax of the corporation would be unaffected. Of course, this could be considered untidy bookkeeping of a comparatively small gross item, but could not constitute wilful attempt to evade and defeat a corporate tax which would not accrue.

All of the evidence is consistent with this view of the actual treatment of the $35,000.00. Adding the $35,000.00 to the corporate reported $2,000,000.00, and subtracting it as compensation of employees and officers would not

affect any evasion or defeat of tax. Neither did ignoring it (the petitioners and acquitted defendants were not required to account) change corporate tax liability.

III.

Because the petitioners have used Nichols Motor Company records as the most flagrant example, the government has misunderstood the complaint concerning trial by unsworn false books in contrast to sworn witnesses.

Again the government by footnote (page 11 of its Brief), has given an erroneous impression of the evidence. The Nichols' books may have been regularly kept, but they were also falsely kept, for they did not mean what they said, (R. 568).

It is, however, the denial of memory by witnesses and the substitution of unsubstantiated and unsworn records as accusers that is petitioners' complaint.

IV.

The government has failed to comprehend the purpose and scope of the petitioners' complaint regarding the administration of Section 3500, Title 18, U.S.C., by the trial court and by the Court of Appeals in its characterization by presentation of questions presented. At page 2 of its Brief, the government states its question No. 4 as follows:

> "Whether the trial court erred in excising, as required by 18 U.S.C. 3500, those portions of a government witness' *testimony* on direct examination, before turning the statement over to defense counsel for cross-examination purposes." (Emphasis supplied).

Section 3500, Title 18, U.S.C., uses the phrase "relate to the subject matter of the testimony of the witness".

It is obvious that this is a substantially broader conception than that urged, or at least used, by the government in its Brief and discussion of this problem. The Court of Appeals below characterized the petitioners' contention in this regard as follows,

> "By their supplemental brief, defendants contend that the court's ruling denying them access to such reports prevented them, on cross-examination of Sharp, from exposing and developing any promise of leniency, or other relationship, between Sharp and the government, on the one hand, and Smith, Kazany and Gallagher, on the other." (Page 16A of Petition)

The exhibits and statements involved here are those of a government *agent* witness, and the statements in question are his written reports and statements concerning the investigation of the case which was the subject matter of his testimony. The government has carefully avoided the issue of constitutionality of the Jencks Act by misrepresentation of the petitioners' reasons for claimed unconstitutionality.

The petitioners do not contend that the Act is unconstitutional only becausc it restricts the defendant's right to examine. The petitioners earnestly contend that the Jencks Act deprives the defendant of his right to be present at all stages of the proceedings (Rule 43 Federal Rules of Criminal Procedure), and "to have the Assistance of Counsel for his defense". (Sixth Amendment to the Constitution of the United States).

Obviously, the defendant and his counsel are excluded from an *in camera* examination, and under the provisions and administration of the Act he is forever barred from knowing this part of the case against him, or the possible benefit of evidence to which he was denied access.

To state that the defendant was excluded from his examination of the document, of course, means that he is denied the right to have the "Assistance" of the educated eye of "Counsel" for examination of such documents so that relevancy, materiality or relationship to the subject matter of the testimony involved might be presented and considered intelligently. This is an ex parte and secret trial and appeal to the extent, however small, that the petitioners are deprived of seeing material submitted to their judges, and thus prevented from advocating any position concerning the substance of the agents' statements.

CONCLUSION.

For the reasons stated in the Petition and in this Reply, the writ of certiorari should be granted.

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